

Laca v Royal Crospin Corp.

2011 NY Slip Op 30874(U)

April 11, 2011

Supreme Court, Queens County

Docket Number: 23449/08

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

FERNANDO LACA,

Plaintiff,

-against-

ROYAL CROSPIN CORP. and
HANS GISSINGER CORP.,

Defendants.

Index No: 23449/08

Motion Date: 2/2/11

Motion Cal. No.: 23, 24

Motion Seq. No.: 3, 2

The following papers numbered 1 to 17 read on this motion by plaintiff for summary judgment as to liability on his Labor Law §240(1) claim, and motion by defendants for summary judgment dismissing all causes of action asserted in the complaint

	<u>PAPERS NUMBERED</u>
Cal.#24 Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Cal.#23 Notice of Motion-Affidavits-Exhibits	10 - 13
Answering & Replying Afidavits.....	14 - 15
Replying Afidavits.....	16 - 17

Upon the foregoing papers it is ordered that these motions are determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained on February 15, 2008 while an employee of Antarctic Construction (hereinafter Antarctic). The defendant, Hans Grissinger Corporation (hereinafter Grissinger), hired Antarctic to renovate a studio apartment Grissinger leased for use in his photography business, from co-defendant, Royal Crospin Corp., the owner of the building.

On the day of the accident, plaintiff was attempting to spackle the ceiling and fell off the 16-18 foot A frame ladder which he was climbing to reach the ceiling sustaining injuries.

Plaintiff commenced this action against the defendants alleging violations of Labor Law §§ 240(1), 241(6) and 200, as well as for common-law negligence.

The plaintiff now moves for partial summary judgment in his favor as to liability on his Labor Law §240(1) cause of action. Defendants separately move for summary judgment dismissing all causes of action asserted in the complaint.

Labor Law § 240(1) imposes a non-delegable duty upon "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure to furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed". Under the Labor Law §§ 240[1] and 241[6] the term "owner" is not limited to titleholders, but also includes one who "has an interest in the property" such as a lessee, and "who fulfilled the role of owner by contracting to have work performed for his benefit" (see Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616 [2008] quoting Copertino v. Ward, 100 AD2d 565, 566 [1984]; Fisher v. Coghlan, 8 AD3d 974, 975-976 [2004], appeal dismissed, 3 NY3d 702 [2004]).

To prevail on his motion, the plaintiff must establish that he was injured during one of the enumerated activities (Labor Law § 240[1]; see Wein v. Amato Props., LLC, 30 AD3d 506, 507; Kretzschmar v. New York State Urban Development Corp., 13 AD3d 270 [2004]), that a violation of Labor Law §240(1) occurred, and that the violation was a proximate cause of his injuries (see Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 524 [1985]; Nimirovski v. Vornado Realty Trust Co., 29 AD3d 762, 763 [2006]).

Here, the plaintiff established, prima facie, his entitlement to summary judgment as a matter of law on his cause of action based upon violation of Labor Law § 240(1) against the defendants Royal Crospin Corp. and Hans Gissinger Corp. Plaintiff submitted his affidavit and Gissinger's deposition testimony which demonstrated that he was engaged in repair and renovation work covered by Labor Law § 240(1), as opposed to routine maintenance, when he fell from an unsecured A frame ladder that moved, opened all the way, bent, broke and collapsed (see Esposito v. N.Y. City Indus. Dev. Agency, 1 NY3d 526 [2003];

Bland v. Manocherian, 66 NY2d 452, 461 [1985]; Salon v. Millinery Syndicate, Inc., 47 AD3d 914 [2008]; Granillo v. Donna Karen Co., 17 AD3d 531 [2005]) and that no safety devices were provided which might have prevented his fall.

Where, as here, the plaintiff has established his entitlement to partial summary judgment on his Labor Law § 240(1) claim, the burden shifts to the defendants to raise an issue of fact as to whether there was a violation of Labor Law § 240(1) and whether the violation was a proximate cause of the injury. This, the defendants failed to do.

Contrary to defendants' argument, the work being performed at the premises was "renovation" and "alteration" work not routine maintenance involving merely replacing components that require replacement due to normal wear and tear (see Smith v. Shell Oil Co., 85 NY2d 1000 [1995]; Esposito v. N.Y. City Indus. Dev. Agency, supra). Gissinger testified that the premises was being renovated for use in his photography business, and entailed the complete demolition and reconstruction of the bathroom, installation of a galley kitchen and additional electric outlets and ceiling lighting which did not previously exist, and painting the premises. The project took about a month. Such activity involved a significant physical change of the composition of the premises and not merely the change of component parts that required replacement in the course of normal wear and tear (see e.g. Aguilar v. Henry Marine Service, Inc., 12 AD3d 542 [2004]; see also Luongo v. City of New York, 28 Misc.3d 1204[A] [Table] [Bronx Sup.Court,2009]).

Insofar as defendants oppose on the ground that the plaintiff's activity at the time of his accident, repairing a hole in the ceiling, was merely "routine maintenance, it is without merit and insufficient to raise a triable issue. Aside from the fact that "repairs" is a statutorily enumerated activity, the plaintiff's activity was contemporaneous with and incidental and necessary part of the ongoing renovation, alteration and painting of the premises (see Cunningham v. Alexander's King Plaza, LLC, 22 AD3d 703, 706 [2005]; Mannes v. Kamber Management, Inc., 284 AD2d 310 [2001]; Aguilar v. Henry Marine Service, Inc., supra; Gale v. Running Brook Builders, Inc., 261 AD2d 436, 437 [1999]) .

Defense counsel's conclusory assertion that the plaintiff did not establish a violation of the statute is insufficient to raise a triable issue. It is undisputed that the ladder was unsecured, moved, opened all the way, broke, bent and collapsed (see Salon v. Millinery Syndicate, Inc., supra; Squires v.

Marini Bldrs, 293 AD2d 808, 808-809 [2002], lv denied 99 NY2d 502 [2002], quoting Beesimer v. Albany Ave./Rte. 9 Realty, 216 AD2d 853, 854 [1995]) and no other safety devices were provided.

Defendants have also failed to raise a triable issue with respect to their claim that plaintiff's negligence was the sole proximate cause of the accident. Defendants do not identify what negligent conduct of the plaintiff was the sole proximate cause of the accident. In addition, the only evidence in this regard is plaintiff's deposition testimony that Tom brought the ladder to the premises on the morning of February 15, 2008, set it up and placed it in the location where plaintiff had to work. Plaintiff merely ascended the ladder. Once a statutory violation which was a proximate cause of the plaintiff's fall is established, there cannot be a finding that the sole proximate cause of the accident was some alleged negligence of plaintiff (see Blake v. Neighborhood Housing Services of New York, 1 NY3d 280, 290-291 [2003]; Bland v. Manocherian, supra at 461; Podbielski v. KMO-361 Realty Associates, 294 AD2d 552, 554 [2002]; see also Hart v. Turner Const. Co., 30 AD3d 213 [2006]).

Accordingly, plaintiff is granted partial summary judgement on liability in his favor as to his cause of action based upon violation of Labor Law § 240(1). The defendants' motion to dismiss the plaintiff's Labor Law § 240(1) is denied.

In view of the above, the branch of the defendant's motion to dismiss the plaintiff's Labor Law §241(6) on the ground that there was no violation and plaintiff's conduct was the sole proximate cause of his accident is also denied.

The branch of the defendants' motion to dismiss plaintiff's causes of action based upon violation of Labor Law § 200 and common law negligence is granted.

Labor Law § 200 is the codification of the common-law duty of owners and contractors to provide employees with a safe place to work (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Allen v. Cloutier Constr. Corp., 44 NY2d 290 [1978]; Yong Ju Kim v. Herbert Constr. Co., 275 AD2d 709, 712 [2000]). Liability for claims based on common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who created or had actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (see Rizzuto v. Wenger Contr. Co., 91 NY2d 343 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]; Lombardi v. Stout, 80 NY2d 290 [1992]; Ortega v. Puccia,

57 AD3d 54 [2008]). "[T]he duty to provide a safe place to work is not breached when the injury arises out of a defect in the contractor's own plant, tools and methods, or through negligent acts of the contractor occurring as a detail of the work" (Cambizaca v. New York City Tr. Auth., 57 AD3d 701, 701-702 [2008] quoting Persichilli v. Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]). In the instant case, the deposition testimony of the parties demonstrates that Tom, Antarctic's foreman, directed the plaintiff's work, and that the defendants exercised no direction or control over the renovation work. Gissinger's presence was in the nature of general supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product which is insufficient to impose liability under Labor Law § 200 (see Natale v. City of New York, 33 AD3d 772, 773 [2006]; Perri v. Gilbert Johnson Enters., Ltd., 14 AD3d 681, 683 [2005]; Dos Santos v. STV Engrs., Inc., 8 AD3d 223, 224 [2004]). Nor did the defendants have notice of the defective ladder which was owned by Antarctic and was first brought to the premises on the day of the plaintiff's fall when neither defendant was present.

In opposition, the plaintiff has failed to raise a triable issue of fact. Plaintiff's argument that issues of fact exist as to whether defendants controlled the plaintiff's work because Gissinger provided an eight foot ladder for the project and/or based upon the superintendent's conversation with either Hans or Gissinger about an electrical problem and what may be the cause, is unsupported by the evidence and, in any event, does not constitute direction or control of the manner in which work is performed sufficient to impose liability or to raise an issue of fact in this regard.

Accordingly, the plaintiff's motion for partial summary judgement on liability in his favor as to his cause of action based upon violation of Labor Law § 240(1) is granted.

The branch of the defendants' motion to dismiss the plaintiff's claims based upon violation of Labor Law § 200 and common law negligence is granted.

The branch of the defendants' motion to dismiss the plaintiff's claims based upon violations of Labor Law § 240(1) and § 241(6) is denied.

Dated: April 11, 2011
 D# 44

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 J.S.C.